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No. 574

In the

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES,
Petitioner,

v.

ESTATE OF JOSEPH P. GRACE, DECEASED, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITION FOR REHEARING

WILLIAM S. DOWNARD,
One Main Place,
Dallas, Texas 75250,
Attorney for Respondents.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

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PETITION FOR REHEARING

Respondents respectfully petition the Court for a rehearing of the above-styled case on the following grounds:

GROUNDS FOR REHEARING

I. Section 811, Internal Revenue Code of 1939, as previously applied by this court, requires recognition of

the decedent's wife, Janet Grace, Rather than the decedent as the transferor or grantor of the trust created by her, in whose taxable gross estate her trust should be included.

The majority opinion rendered June 2, 1969, upholds the Commissioner of Internal Revenue in taxing to the decedent's estate property transferred in trust by his wife, Janet Grace, in reliance upon Section 811 (c) (1) (B) of the Internal Revenue Code of 1939. We respectfully call to the attention of the Court that this perverse application of Section 811 is directly contrary to long established principles of estate taxation as previously declared by this Court in *Lober v. United States*, 346 U.S. 335 (1953); *Commissioner v. Holmes*, 326 U.S. 480 (1946); *Commissioner v. Estate of Church*, 335 U.S. 632 (1949); *Estate of Spiegel v. Commissioner*, 335 U.S. 701 (1949) and *Helvering v. Hallock*, 309 U.S. 106 (1940).

Subdivisions (c) and (d) of Section 811 are directly parallel. Each subdivision requires inclusion in the gross estate of a decedent of property * * * "to the extent of any interest therein of which *the decedent* has at any time *made a transfer*" of the kind specified.

This Court's prior decisions above cited, as well as others in harmony therewith, have unequivocally held that, as applied to the facts in this case the properties transferred in trust by the decedent's wife, Janet Grace, must be taxed to the estate of Janet Grace (instead of to her husband's estate) as the statutory "decedent" who "made a transfer" of this property under which *she* retained a power to alter, amend or revoke that trust which she created, by the direct

application of the inexorable and ubiquitous statutory language of Section 811(d)(2).

In creating the Janet Grace trust, the decedent's wife (1) named *herself* as one of the three trustees, and (2) reserved the power to herself, in conjunction with either one of the other two trustees, to alter the trust by paying to the primary life beneficiary "any amounts of the principal of the said trust, up to and including the whole thereof, which the said Trustees or a majority of them may at any time or from time to time deem advisable." [Finding 12(a) App. 98-99]

In *Commissioner v. Holmes, supra* this Court squarely held that such a power of termination results in an incomplete transfer with the consequence that the transferor (in this case, Janet Grace) is to be treated for estate tax purposes as owner of the transferred property at the time of her death because of her retained powers over it. The Court there declared, with reference to a power retained by the settlor virtually identical to the power retained by Janet Grace over the trust in question (326 U.S. at 487, 66 S. Ct. at 260):

> "A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which §811(d)(2) requires in order to avoid the tax."

The Court reiterated and amplified that holding in *Lober v. U. S., supra,* where this Court, speaking through Mr. Justice Black, stated (346 U.S. at 336):

> "In *Commissioner v. Holmes* * * * we held that power to terminate was the equivalent of power to 'alter,

amend or revoke' it, and we approved taxation of the Holmes estate on that basis. * * *

Rejecting an asserted distinction between *Holmes* and *Lober* to the effect that in the former case the interests of ultimate beneficiaries were contingent and could be cut off by accelerated distribution, whereas in the latter case the beneficiaries' interests were vested and distribution could only be accelerated to the same beneficiaries who would ultimately become entitled to the trust properties, the Court further declared in the *Lober* case (346 U.S. at 337):

> "* * * This father could have given property to his children without reserving in himself any power to change the terms as to the date his gift would be wholly effective, but he did not. * * *"

Likewise, Janet Grace could have given her homestead to her husband for life with remainder to her children, without reserving to herself any power to change the terms as to the date her gift would be wholly effective. Having expressly retained such a power to alter the trust, she obviously did not divest herself "of that degree of control which §811(d)(2) requires in order to avoid the tax", as this Court held in the *Holmes* and *Lober* cases. See, also, *Michigan Trust Company v. Kavanagh*, 284 F. 2d 502 (6th Cir., 1960), where the Court of Appeals explicates (284 F. 2d at 505):

> "And so, Holmes and Lober clearly indicate that a power to invade corpus and distribute to the beneficiaries is a power to alter, amend or revoke, under the statute, and this includes a power to terminate the trusts, altogether."

To the same effect, see *DuCharme's Estate v. Commissioner*, 164 F. 2d 959 (6th Cir., 1947); *Hurd v. Commissioner*,

160 F. 2d 610 (1st Cir., 1947); *First National Bank of Portland v. United States*, 250 F. Supp. 213 (S.D. Me. 1966).

As §811(d)(2) expressly refers to powers exercisable "either by the decedent alone or in conjunction with any person", there can be no question that the reservation of this power to a majority of three trustees, of whom Janet Grace was one, was a power exercisable by her in conjunction with another person. See *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935).

Besides Janet Grace's status as taxable transferor deemed to have retained ownership of this property under Section 811(d)(2), the direct and obvious application of Section 811(c)(1)(B), which the majority opinion deems applicable, requires the treatment of Janet Grace as continued owner until her death of the properties which she transferred to the Janet Grace trust.

See finding 12(c) (App. 30-31):

> "At the time of the creation of the Janet Grace trust, there was no indication that * * * Janet Grace * * * ever expect to leave Tullaroan during their lives; and in fact both continued to live there until they died. There was no change whatever in the use and enjoyment of the homestead by * * * Janet Grace * * * as a result of the transfer of the legal title from Janet Grace to the trustees of the Janet Grace trust."

Moreover, Joseph Grace exercised a limited power of appointment under the Janet Grace trust instrument almost immediately after creation of that trust so as to give Janet Grace a successive life estate in the trust property should

he predecease her. See Deed of Appointment dated January 27, 1932, *Commissioner's Exhibit 36.*

In the *Spiegel* case, this Court speaking through Mr. Justice Black declared, in unequivocal terms ringing with clarity (335 U.S. at 705):

> "* * * In the Church Case we stated that a trust transaction cannot be held to alienate all of a settlor's 'possession or enjoyment' under § 811(c) unless it effects 'a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, and no right to possess or enjoy the property then or thereafter. In other words such a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies'. * * * He has therefore not made that 'complete' kind of trust transfer that § 811(c) commands as a prerequisite to a showing that he has certainly and irrevocably parted with his 'possession and enjoyment'.

See, also, *Helvering v. Hallock*, 309 U.S. 106, 60 S. Ct. 444, 125 ALR 1368; *Smith v. Shaughnessy*, 318 U.S. 176, 63 S. Ct. 545.

In the *Church* case, *supra*, Mr. Justice Black, speaking for the Court, explained the rationale of the *Hallock* case in the following terms (355 U.S. at 643-644):

> "* * * We declared that the statute now under consideration 'taxes not merely those interests which are deemed to pass at depth according to refined technicalities of the law of property. It also taxes inter vivos transfers that are too much akin to testamentary

> 'dispositions not to be subjected to the same excise,' p. 112, 'and inter vivos gifts resorted to, as a substitute for a will, in making dispositions of property operative at death' p. 114. * * *
>
> Moreover, the *Hallock* Case, p. 114, stands plainly for the principle that 'In determining whether a taxable transfer becomes complete only at death we look to substance, not to form * * * However we label the device if it is but a means by which the gift is rendered incomplete until the donor's death' the 'possession or enjoyment' provision applies."

Measured by these clear and inexorable standards, Janet Grace, when she transferred the homestead property which she had owned for over 20 years along with 40 shares of stock producing enough income to pay the taxes on it, to herself as trustee with reserved powers and without any change in her continued possession and enjoyment of the property, failed to make a sufficiently completed transfer to be cognizable for federal estate tax purposes. Instead because of her retained possession and enjoyment (§ 811(c) (1) (B)) and her retained power to alter the trust, which she kept until her death (§ 811(d) (2)), she made a postponed transfer "much too akin to testamentary dispositions" not to be subjected to treatment as "a substitute for a will, in making dispositions of property operative at [her] death."

This Court's decisions in the *Holmes*, *Lober*, *Spiegel*, *Church*, *Hallock* and similar cases have long since become great landmarks of federal estate tax law, which have breathed life and meaning into Section 811 (c) and (d), 1939 Internal Revenue Code. The fundamental concepts

therein announced, and now universally recognized as touchstones of estate taxation, should not now be silently overruled by the majority opinion in the present case. Notwithstanding that it was the decedent's wife, Janet Grace, who made the transfer of her properties to the trust she created under which she retained not only the possession and enjoyment of her property for life but also a power to alter the disposition of it, the majority opinion inexplicably fails to recognize Janet Grace as the transferor in whose taxable estate this property must be included for estate tax purposes in accordance with the principles long adhered to by this Court.

Once Janet Grace is recognized as the statutory transferor who "made a transfer" of this property "under which she retained" the taxable incidents of ownership of this property, it becomes obvious that her husband, the decedent whose estate is presently before the Court, is *not* the person who "made a transfer" of that property "under which the transferor retained" the life estate that was given to him by his wife.

If Janet Grace had devised and bequeathed a life estate in the homestead and 40 shares of stock to her husband in her will, no one would contend that the property would be taxable to the estate of her husband, the life tenant, upon his death. Yet, under the principles of this Court's previous decisions, she should be treated as having made a testamentary disposition, resorted to as a substitute for a will. Should not the estate tax consequences be the same as if she had devised this property by will?

While we subscribe completely to the statement of the majority opinion that "the taxability of a trust corpus * * * does not hinge on a settlor's motives, but depends on the nature and operative effect of the trust transfer", we respectfully submit that the Court failed to recognize that the true "nature and operative effect" of the Janet Grace trust was, in accordance with the principles established by this Court's previous federal estate tax decisions, an incomplete and ineffective transfer *by Janet Grace*, taxable as a testamentary devise by her, operative at *her* death and fully taxable as part of *her* gross estate. The decedent whose taxable estate is here involved was merely a recipient donee life tenant of the property transferred in trust by his wife whose estate was taxable on her disposition of it effective at her death.

We respectfully submit that the majority opinion errs in approaching the issue presented by this case as if the question were whether the trust which the Government seeks to tax to the decedent's estate is taxable at all, or should be permitted to escape estate taxation entirely. See footnote 8 to the opinion, which indicates the Court's understanding that the creation of this trust was part of "an arrangement under which he and his wife retained present enjoyment of the property and under which the property would pass to their children without imposition of either estate or gift taxes." This statement, we submit, entirely misconceives the facts and law of the case.

Respondents do not contend, as the opinion seems to assume, that the trusts involved were without estate tax

consequences, or that either trust was non-taxable. Instead, the proper question is to *whose* estate the Janet Grace trust is properly taxable under Section 811 of the 1939 Internal Revenue Code. Under the plain and inexorable language of Section 811 (c) and (d), as well as the previous decisions of this Court giving full scope and meaning to these statutory provisions, the Janet Grace trust was fully taxable as a part of *her* taxable estate, and the trust created by Joseph Grace fifteen days earlier likewise remained a part of his taxable estate so long as he retained the taxable power, as one of its trustees, to alter the trust by distributing the principal to his wife. See the *Lober* and *Holmes* cases, *supra*. Under these established principles, each trust was wholly ineffective to avoid any estate taxes, and each trust should be held includable only in the estate of the transferor of properties who "made a transfer under which he retained" the taxable incidents as prescribed by statute.[1]

II. The Opinion of June 2, 1969, if permitted to stand, will obstruct and obfuscate the orderly administration of the Estate Tax Laws and result in double taxation.

The majority opinion, by treating a person other than the person who owned the property, and from whom title passed in trust, as the party to be taxed as transferor of the property, instead of the actual transferor, merely be-

[1] The Joseph Grace trust, to which the decedent transferred various commercial investment real estate interests on December 15, 1931, terminated in 1937, some 13 years before he died, at which time he lost all power or interest or control which he originally retained with respect to those properties, and even the petitioner concedes that trust is not properly to be included in his estate, because he irrevocably parted with those properties during his life.

cause the trust to which the transfer is made is "inter-related" in some undefined way to another trust created by another party, renders the statute of such dubious and transitory meaning as to result in vast chaos and uncertainty as to whom the statute does or does not apply.

No concept of maximizing the revenue, nor even a prejudicial bias in favor of the Government winning all tax cases, would justify the loose and inarticulate application to the estate tax in this case. For the Government, no less than its taxpaying citizens, benefits from consistency in the application of definitive principles of taxation which can be administered with certainty of application. And consistent application of a loosely formulated "inter-related" trust test for switching the identity of the transferors, while it may be capable of such discretionary inconsistency in administration as to amount to arbitrary administrative authority to levy taxes wherever the maximum revenue will result, will not necessarily always have that result.

For example, a husband and wife or other relatives who each make gifts in trust near in time may be held not liable for gift taxes as donor, on the ground that the other spouse made the transfer, instead of the spouse who actually transferred the property. See, for example, *McLean v. Commissioner*, 127 F. 2d 942 (5th Cir., 1942), where the taxpayers, husband and wife, created identical trusts for the benefit of each other at the same time and contended these trusts were not taxable because they were created as consideration for each other, and it was the Government which denied that the trusts were reciprocal in the absence of actual

proof that one was executed as consideration for the other. Since the gift tax is complementary to the estate tax and "*in pari materia*" with it, the same principle should apply consistently, and there would be no logical reason to subject one spouse to gift tax as if he were the transferor and tax the opposite spouse's estate as if she were the transferor.

Likewise, even in the estate tax field, it is not necessarily to the Government's advantage to switch the transferors for tax purposes. See, for example, *Commissioner v. Estate of Guenzel*, 258 F. 2d 248 (8th Cir. 1958) where a husband's estate contended that a trust created by him should not be included in his estate because, by application of the reciprocal trust doctrine, his wife was to be treated for tax purposes as the settlor who made a transfer to his trust. In that case, it was the Government which insisted that the reciprocal trust doctrine was inapplicable because of the absence of strict proof that the two trusts were created in consideration of each other, notwithstanding that the wife's estate had previously been taxed on the husband's trust on the ground that the trusts were "reciprocal". In the *Guenzel* case the Eighth Circuit decided in favor of the Government, on the theory which respondents urge here (258 F. 2d at 254):

> "The Lehman doctrine has generally been used to reach trusts on the principle of looking to the substance rather than the form when the trusts, on the basis of their language, are apparently free from tax. * * *
>
> "Since the trust created by each of the Guenzels was by its terms taxable as a transfer against the estate of the grantor of the trust, there was no need to resort

> to the Lehman doctrine to make the value of the trusts subject to estate tax. Additionally, there is considerable doubt whether the Lehman doctrine can properly be applied to the trusts here involved. * * *"

As the *Guenzel* trusts were "inter-related" to a much greater extent than the *Grace* trusts, the application of the new doctrine announced in the opinion in the present case would clearly have required that the identities of the grantors of the Guenzel trusts must be interchanged on the grounds that the trusts were "reciprocal", resulting in loss by the Government.

Perhaps a more serious evil, from the standpoint at least of the nation's taxpaying citizens, is the probable use of the new doctrine announced in the present decision to effect double taxation clearly not intended by Congress. Is it not abundantly clear that if Janet Grace's estate were before the Court in the present case, the Janet Grace trust would be included in her taxable estate under the *Lober* and *Holmes* decisions? Is it not equally clear that the result of the opinion of June 2, 1969, would require also that the trust created by Joseph Grace fifteen days earlier be included in her estate as reciprocal? Thus, the new theory would require taxation of Janet Grace as transferor of both trusts, when in reality she obviously "made a transfer" of her property to only one trust. And in many instances, when both spouses have died, the Government will have collected estate taxes on four trusts where only two were created, and perhaps gift taxes as well on the same trusts.

This is a clear case of overkill, generated by adoption of the Government's fallacious assertion that imposition of tax

on the husband's estate in this case is required to prevent avoidance of tax and close a tax "loophole", when in fact no loophole or possibility of tax avoidance ever existed, since each trust from its inception remained taxable directly as part of the estate of the respective settlor who transferred his or her property in trust retaining taxable powers over the transferred property.

The willy-nilly extension of the reciprocal trust doctrine to all "inter-related" trusts, allowing as it does discretionary multiplication of taxes at the whim of the administrative authority, is contrary to the cautiously restrictive approach of the courts in all previous cases involving application of the reciprocal trust doctrine, typified by the Tax Court's declaration in *Estate of Ruxton v. Commissioner*, 20 T.C. 487, at 494 (1953):

> "In our opinion, that doctrine should be applied only when clearly warranted by the particular facts of a case considered in the light of the decided cases."

III. The Decision of June 2, 1969 is based on erroneous fact assumptions contrary to the findings of the Trial Court and determined by the Supreme Court without hearing any evidence.

A. Relative value of transfers in trust.

At the first trial of this case in 1963, respondents (plaintiffs at the trial) presented expert valuation testimony establishing that the values of the properties transferred by Joseph P. Grace on December 15, 1931, to the Joseph Grace trust totalled $530,592.00; and that the value of the Tullaroan

property and 40 shares of Lundy's Lane Corporation transferred in trust by Janet Grace on December 30, 1931 had a total value at that time of $1,049,831.20. The Government presented no evidence to refute such values; however, the trial was adjourned without completion of the proof on such values, both sides reserving the right to present further valuation evidence, under an agreement by the parties that the primary issue whether the Janet Grace trust should be included in the decedent's estate to any extent should be submitted to the Court of Claims on the record as it then stood, so that the detailed proof as to relative values of the trusts would be completed only if the Court of Claims should decide that the Janet Grace trust was to some extent taxable to her husband's estate.

The consequence of this undetermined fact issue is that under the reciprocal trust doctrine as heretofore understood, the decedent's estate would be taxable only "to the extent" that he had "made a transfer" to his spouse's trust by furnishing consideration therefor. In other words, if the decedent transferred $530,000.00 in trust for his wife as consideration for her transfer of $1,049,000.00 in trust for his benefit, the previous cases would hold the decedent's estate taxable upon only 530/1,049ths of the value at the time of his death of the property in his wife's trust, for only to that proportionate extent is he deemed to have "made a transfer under which he retained" the benefits provided in his wife's trust. To the extent of the proportion of his wife's trust that exceeded the value of properties transferred in trust by the decedent, having given no consideration for such excess, the

decedent is deemed to have received a gift from his wife, and like any other donee-life-tenant that proportion received as a gift from his wife would not be included in his taxable estate. See *Estate of Hanauer v. Commissioner*, 149 F.2d 857, at 859, (2nd Cir., 1945) cert. den. 326 U.S. 770, where the Court said *obiter:*

> "Doubtless in other cases in which the value of the property transferred from the decedent's estate is less than that of the reciprocal trust, that lesser value will constitute a factor limiting the portion of the reciprocal corpus which may be included in the decedent's gross estate — only in part will it constitute a *quid pro quo* for a larger trust. And if, due to this limiting factor, only a part of the value of the reciprocal corpus is includable in the gross estate, how an increment (or shrinkage) in the value of the entire reciprocal corpus account prior to the decedent's death shall be reflected in the portion thereof to be included in the gross estate is a problem which can be dealt with when it arises."

And see *Estate of Boardman v. Commissioner*, 20 T.C. 871, where the decedent transferred $67,953.76 in trust for her spouse, who transferred $68,226.26 to a concededly reciprocal trust for her benefit. At the decedent's death, the reciprocal trust created by her spouse was valued at $121,490.20. The Tax Court held that the amount properly taxable to her estate was 67,953.76/68,226.26 x $121,490.20.

We may presume that some such proportionate formula would be required under Mr. Justice Marshall's pronouncement that "* * * application of the reciprocal trust doctrine requires only that * * * the arrangement, *to the extent of mutual value*, leaves the settlors in approximately the same

economic position as they would have been in had they created trusts naming themselves as life beneficiaries." (Op. 8; see also, Op. 9) Under that formulation, the "extent of mutual value" remains to be proved. If the trier of facts finds that the decedent transferred property in trust worth only half of the value of properties transferred in trust by his wife, then only to the extent of half of the value of her trust would he be in approximately the same economic position as he would have been in had he created a trust naming himself as life beneficiary. He could not, naming himself beneficiary of his properties worth $500,000 attain the same economic effect as being named beneficiary of a $1,000,000 trust created by his wife.

Although the Court of Claims refrained from making any finding whatever with reference to the values of the properties transferred to the trusts at the time of transfer, the Court's opinion, in its recitation of facts, refers to "the smaller of the two trusts, the Janet Grace trust" (Op. 3). Presumably, the Court was led to that assumption of fact concerning relative values by the Solicitor General's assertion to that effect in argument, unsupported by any evidence or findings. This erroneous assumption of fact evidently led Mr. Justice Marshall to state in the majority opinion, that "the value of the Janet Grace trust fund must be included in the decedent's estate" (Op. 8). And, while holding that the transfers "left each party in the same objective economic position as before", only "to the extent of mutual value", and proclaiming that "economic value is the only workable criterion", the opinion concludes with

the statement that "Joseph Grace's estate remained undiminished to the extent of the value of his wife's trust and the value of his estate must accordingly be increased by the value of that trust."

This statement, if taken at face value to mean that the entire value of his wife's trust must be included in his estate, can only be based upon an assumption that Joseph Grace transferred in trust property worth at least as much as the property placed in trust by his wife; otherwise the terms "to the extent of mutual value" and "economic value is the only workable criterion" would be mere empty and meaningless phrases. This assumption of fact with reference to relative values of the properties is arrived at in the majority opinion without hearing any evidence, based on no findings of the Court below, and contrary to the only evidence now of record, which is as yet undisputed.

The Government, in its brief, did not even ask the Court to make findings of fact as to the relative values of properties. Instead, its conclusion asks that "the case should be remanded for further proceedings", with this footnote (Brief for the United States, p. 42):

> "[25]If the decision below is reversed, *the Court of Claims must decide respondents' contention* going to the *value* of the resulting addition to decedent's estate."

The Court gave the Government what it asked for and remanded the case "for further proceedings consistent with this opinion." However, such "further proceedings" would be useless if the opinion be taken at face value to require

the inclusion of "the value of the wife's trust" in its entirety in the decedent's estate.

Therefore, even if the decision is permitted to stand, it should be modified to properly state the proportion of the wife's trust that should be included in her husband's estate, leaving to the Court below the duty to ascertain the facts relevant to values of properties, based on evidence presented at the "further proceedings" to be had upon remand.

B. The Opinion of June 2, 1969 assumes a tax-avoidance motive contrary to the express findings of the court below.

The Court of Claims, after a full trial, took note of the Government's argument without proof that the trusts involved here were created for tax avoidance motives and sought to determine the possible existence of such motives by remanding the case for a further trial on the specific issue "as to whether the decedent was motivated in the setting up of the Joseph Grace and the Janet Grace trust, in December 1931, by the desire to avoid or lessen estate taxes". (See Remand Order dated March 25, 1966, App. 39.) After a full trial on that issue, the Court of Claims found as a fact that the decedent was not motivated by tax-avoidance. Yet the opinion of this Court relies heavily on a factual conclusion that "there is a high probability that such a trust arrangement was indeed created for tax-avoidance purposes" — a fact assumption arrived at without hearing any evidence relative thereto, and apparently based solely on the statement in footnote 8 (Op. 7). As

shown above, the assumptions stated in footnote 8 with respect to the estate tax effects of these trusts are contrary to the established law as declared by previous decisions of this Court applied to the trusts here involved. Sections 811(c) (1) (B) and 811(d) (2) are virtually identical in all material respects to the provisions of Section 302(c) and (d) of the Revenue Act of 1926 in effect at the time of creation of these trusts, and at that time of their creation both trusts were legally ineffective to remove any of the transferred properties from the estates of the respective transferors. The assumption, contrary to the findings of the trier of facts, of a probability that the trusts were "created for tax-avoidance purposes" is, in these circumstances, unwarranted. The existence of such a probability is a question of fact that has been determined by the trier of facts after a full hearing of all evidence concerning creation of the trusts.

C. The Opinion relies upon erroneous fact assumptions with reference to the economic consequences, arrived at without hearing any evidence and contrary to the findings of the lower court.

The majority opinion declares the new legal standard for application of the reciprocal trust doctrine, requiring that the trusts be inter-related and "that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as beneficiaries." This is essentially a question of fact as to which

respondents should be permitted to present proof. As this test has never before been recognized in the prior decisions of lower courts, and at the trial of this case the parties did not have available the guidance of this Court as to the proper test, the case was not tried with this question in mind and the trier of facts has had no opportunity to make findings relevant to the issue now presented. Neither did respondents have any occasion to present their argument to this Court with reference to the significance of the facts already found by the Court below in the application of this new standard of taxability. Consequently respondents fervently pray that the Court will permit a rehearing at which they may call the Court's attention to the facts relevant to this determination. If permitted, we shall show convincingly that the two trusts involved in this case did not in fact leave the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as beneficiaries. Specifically, we believe the evidence and findings negate the following factual conclusions upon which the decision is based:

> 1. "It is also clear that the transfers in trust left each party * * * in the same economic position as before." (Op. 8-9)
>
> 2. Indeed, it appears, as would be expected in transfers between husband and wife, that the effective position of each party *vis-a-vis* the property did not change at all. (Op. 9)

These factual conclusions are not only unsupported by any findings of the court below, but are opposite to the real and substantial economic effects of these transfers in fact.

If permitted to be heard, we shall show that the "nature and operative effect" (Op. 7) of each transfer in trust was entirely different from the other, leaving each spouse in an entirely different economic position than before, and also that the decedent occupied a position entirely untenable with a retention of any interest in the properties which he transferred in trust.

WHEREFORE, respondents request that a rehearing be granted and that upon further consideration the Court modify its decision herein, at least to the extent necessary to indicate to the court below what issues are open for its determination in the further proceedings after remand, and what standards shall be applied for resolving such issues.

Respectfully submitted,

WILLIAM S. DOWNARD,
One Main Place,
Dallas, Texas 75250,
Attorney for Respondents.

CERTIFICATE OF COUNSEL

I hereby certify that this petition is presented in good faith and not for delay.

William S. Downard,
One Main Place,
Dallas, Texas 75250,
Attorney for Respondents.

PROOF OF SERVICE

I hereby certify that the foregoing petition has been served upon the United States by depositing a copy thereof in a United States Post Office with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530, this 22 day of July, 1969.

William S. Downard,
One Main Place,
Dallas, Texas 75250,
Attorney for Respondents.